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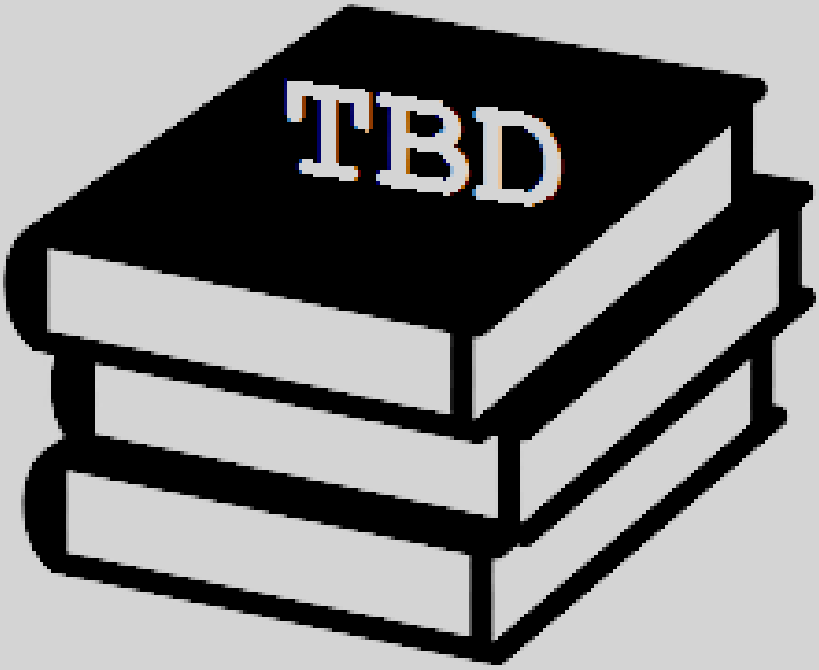

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UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

AMERICAN INTERNATIONAL SPECIALTY LINES INSURANCE COMPANY, a foreign corporation,

Plaintiff,

v. CASE NO: 8:09-cv-1264-T-26TGW

MOSAIC FERTILIZER, LLC, a foreign limited liability company and CSX TRANSPORTATION, INC., a foreign corporation,

Defendants.
_____/

O R D E R

This cause comes before the Court on Defendant Mosaic Fertilizer, LLC's Motion to Dismiss Complaint and Supporting Memorandum of Law (Dkt. 28) and Plaintiff's Memorandum of Law in Opposition (Dkt. 33).

Plaintiff, American International Specialty Lines Insurance Company, filed this civil action seeking to recover response costs pursuant to Section 107 of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. § 9607(a) and Section 376.313, Florida Statutes, which closely

mirrors the provisions in CERCLA[1], as well as seeking declaratory judgment for future damages and relief based on Florida and common law causes of action. Plaintiff alleges that its assignors and subrogees have spent millions of dollars since the mid-1970's under Florida Department of Environmental Protection orders to clean up a former phosphate mining site in Polk County that dates back to the turn of the century. In filing the present complaint, Plaintiff alleges, based on the information then in its possession, that Defendant, Mosaic Fertilizer, LLC ("Mosaic"), was directly liable under CERCLA as an "arranger" responsible for the disposal of waste on the relevant property, and also liable as the successor-in-interest to a prior "owner or operator" which ran a phosphate mining operation on the property.

Plaintiff asserts that through a complicated tangle of mergers, acquisitions, and transfers, Mosaic is one of the few remaining phosphate companies in Florida and that Mosaic's "arranger" liability is likely a product of a predecessor's actions rather than Mosaic's own. Nonetheless, Plaintiff alleges that Mosaic is ultimately liable for giving away and selling wastes which are substances regulated under CERCLA, the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6901 *et seq*., the Clean Water Act ("CWA"), 33 U.S.C. § 1251, *et seq*. ("Regulated Substances"), and Section 376.313,

[1] See State of Florida v. Allied Scrap Processors, Inc., 724 So. 2d 151 (Fla. Dist. Ct. App. 1998) (holding that "the language of the operative liability provisions in the Florida law closely mirrors comparable provisions in [CERCLA]").

Florida Statutes, and which were both distributed to the site at issue and released at the site, resulting in acid and arsenic contamination.

Mosaic seeks to dismiss the complaint with prejudice based on information contained in a limited set of corporate records which Mosaic attaches to its motion and argues should preclude a finding of liability in this case. Plaintiff asserts that Mosaic's evidence and arguments only serve to emphasize the need for the recently-initiated discovery process to continue so that Plaintiff may further develop and clarify its claims in this case. Plaintiff urges that Mosaic's motion effectively seeks to do away with the discovery process in this case by seeking a summary determination of the primary factual dispute underlying Plaintiff's claims based on "facts" that cannot yet be conclusively established.

Standard for Dismissal

In determining whether to grant a Fed. R. Civ. P. 12(b)(6) motion, the Court shall not dismiss a complaint if it includes "enough facts to state a claim for relief that is plausible on its face." Bell Atlantic Corp. v. Twombly, 127 S. Ct. 1955, 1974 (2007) (dismissing complaint because plaintiffs had not "nudged their claims across the line from conceivable to plausible"). The Court must assume the well-pleaded facts of the complaint are true and must likewise construe those facts favorably to the plaintiff. See 5A Charles A.Wright & Arthur R. Miller, Federal Practice and Procedure § 1368 (1990). "While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, (citations omitted), a plaintiff's obligation to provide the 'grounds' of

his 'entitlement to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." Twombly, 127 S. Ct. at 1964-65. To survive a motion to dismiss under Twombly, a complaint's factual allegations, if assumed to be true, "must be enough to raise the right to relief above the speculative level." Id. at 1965. The Court finds that the complaint passes muster under Twombly and that Plaintiff should be permitted to continue its pursuit of the facts and evidence that will ultimately prove or disprove its claims.

Discussion

Given that a motion to dismiss should concern only the complaint's legal sufficiency, and is not a procedure for resolving factual questions or addressing the merits of the case, the Court will not consider the exhibits submitted in support of Mosaic's motion to dismiss. See Federal Practice and Procedure § 1356 (2d ed. 1990); GSW, Inc. v. Long County, 999 F. 2d 1508, 1510 (11th Cir. 1993). Indeed, "this Circuit has made it clear that, generally, '[c]onsideration of matters beyond the complaint is improper in the context of a motion to dismiss….'" Harvey M. Jasper Retirement Trust v. Ivax Corp., 920 F. Supp. 1260, 1263 (S.D. Fla. 1995) (quoting Milburn v. U.S., 734 F.2d 762, 765 (11th Cir. 1984)). The only permissible way to consider such extrinsic evidence would be to "convert" the motion to dismiss into a motion for summary judgment. Property Management & Investments, Inc. v. Lewis, 752 F.2d 599, 604 (11th Cir. 1985); Concordia v. Bendekovic, 693 F. 2d 1073, 1075 (11th Cir. 1982). However, consideration of a summary judgment motion is only proper when "the party opposing the

motion has had an adequate opportunity for discovery." Snook v. Trust Co. of Georgia Bank of Savannah, N.A., 859 F.2d 865, 870 (11th Cir. 1988); see also Galligan v. Raytheon Co., 2009WL 2985689, at *1 (M.D. Fla. Sept. 15, 2009) (finding summary judgment motion to be improper when opposing party was not given opportunity to develop facts through discovery); Fed.R.Civ.P. 12(d) (requiring that parties be given "a reasonable opportunity to present all material that is pertinent to the motion" before a motion to dismiss may be converted to a motion for summary judgment). As Plaintiff points out, the Court only issued its Case Management and Scheduling Order permitting the discovery process to commence on September 8, 2009, and no discovery has yet been exchanged between the parties. In addition, before a Court may convert a motion to dismiss into a motion for summary judgment, "the court must first communicate its intention to the parties to so treat the motion and then allow the parties ten days to submit any relevant evidence and argument in support or opposition to the merits." Marine Coatings of Ala. v. United States, 792 F.2d 1565, 1568 (11th Cir. 1986). No such opportunity has been afforded to Plaintiffs. For these reasons, the Court declines to convert Mosaic's motion into a motion for summary judgment.

Mosaic first moves to dismiss Plaintiff's claims by arguing that the complaint's allegations regarding Mosaic's liability as an "arranger" and an "owner and operator" are factually incorrect. CERCLA authorizes suit against four classes of parties: (1) the owners and operators of a facility at which a release or threatened release of hazardous substances exists; (2) the owners or operators of such a facility any time in the past when

hazardous substances were disposed of; (3) any person or entity who "arranged for" the treatment or disposal of a hazardous substance at the facility; and (4) any persons who transport hazardous substances to the facility. See Florida Power & Light Co. v. Allis Chalmers Co., 893 F.2d 1313, 1317 (11th Cir. 1990); see also, 42 U.S.C. § 9607(a). Liability under Florida law may be analyzed using the same analysis applicable to liability claims under CERCLA. Allis Chalmers, 893 F.2d at 1317.[2] Mosaic does not dispute that a successor can be held liable for the activities of a predecessor who qualifies as an owner/operator or arranger under CERCLA. (Dkt, 28, pp. 11-13). Indeed, Mosaic can be held liable for past activities of a predecessor based on a wide range of mergers, acquisitions, and transactions. Plaintiff alleges that after a series of mergers and acquisitions, Mosaic is the successor in liability for phosphate companies which owned or operated certain parcels of land which were "used for phosphate mining." (Dkt. 1, ¶ 26-30.) Although Mosaic challenges Plaintiff's allegations as to liability as factually incorrect and seemingly demands a step-by-step history of every transaction through which liability was transferred, such a detailed corporate history is not required under the Rules, nor would such facts be attainable without discovery. As another District Court judge in this district held in denying a similar motion to dismiss based on a defendant's claim that plaintiff did not properly understand a particular corporate relationship,

[2] Contrary to Mosaic's assertion, there is no rule that precludes a Plaintiff from seeking relief under two separate causes of action, even where relief must ultimately be granted under only one of those claims.

Plaintiff needs "an opportunity to determine, through additional discovery, the relationship" between Mosaic and the other parties. Hillsborough County v. A & E Road Oiling Service, Inc., 853 F. Supp. 1402, 1412 (M.D. Fla 1994). Plaintiff asserts that it anticipates learning many more specifics through the discovery process, and that an amended pleading may be more appropriate and helpful at a later stage in the discovery process. For now, the Court finds that the allegations of successor liability in the Complaint are sufficient to put Mosaic on notice that Plaintiff seeks to impose liability based upon the actions of Mosaic's predecessors.

In addition to challenging the factual basis for Plaintiff's "arranger" liability claim, Mosaic argues that Plaintiff fails to state a claim because it has failed to properly allege an intent to dispose. However, the Supreme Court, in Burlington Northern & Santa Fe Railway Co. v. U.S., 129 S. Ct. 1870 (2009), narrowed the scope of arranger liability by requiring intentional steps to dispose only with respect to new products. Id. The Supreme Court stated that "[it] is plain from the language of the statute that CERCLA liability would attach under § 9607(a)(3) if an entity were to enter into a transaction for the sole purpose of discarding a used and no longer useful hazardous substance" while "[i]t is similarly clear that an entity could not be held liable as an arranger merely for selling a new and useful product if the purchaser of that product later, and unbeknownst to the seller, disposed of the product in a way that led to contamination." Id. at 1878. The facts alleged by Plaintiff in the complaint are sufficient to demonstrate at this juncture of the proceedings that Mosaic is an arranger for disposal because Mosaic had a useless by-

product from its phosphate processing plants which it did not want to dump in its waste water ponds but instead gave and/or sold to Kaiser Aluminum & Chemical Corporation who dumped them on its own property instead. (See Dkt. 1, ¶¶ 35, 47-50, & 57-59.) Because Plaintiff sufficiently states claims for relief under CERCLA and Section 376.313, Florida Statutes, it likewise sufficiently states its interrelated claim for declaratory relief.

ACCORDINGLY, it is **ORDERED AND ADJUDGED**:

Defendant Mosaic Fertilizer, LLC's Motion to Dismiss Complaint (Dkt. 28) is denied. Defendant shall file its answer and any defenses within ten (10) days of this order.

DONE AND ORDERED at Tampa, Florida, on October 9, 2009.

s/*Richard A. Lazzara*
RICHARD A. LAZZARA
UNITED STATES DISTRICT JUDGE

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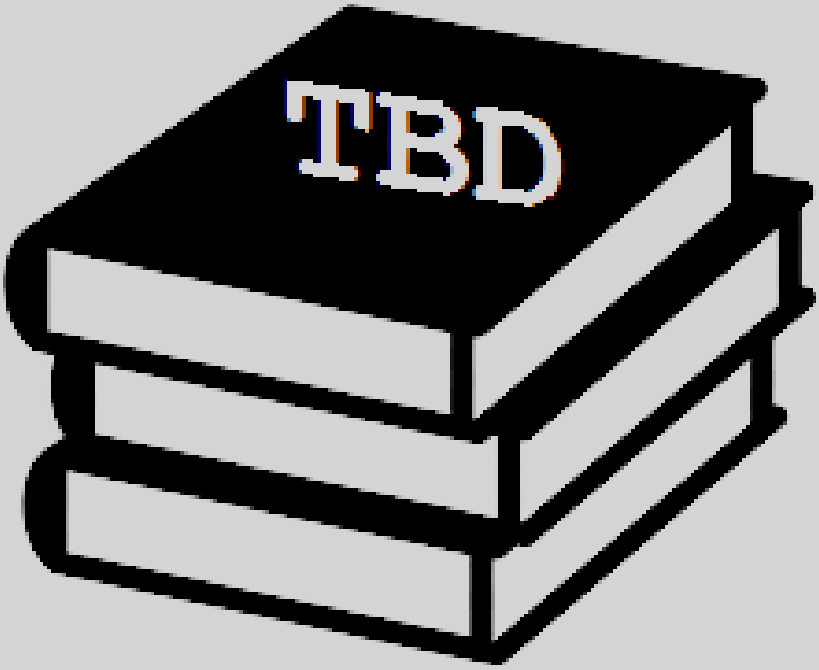

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